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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 2, 4, 7, 8, 9, 17, 18, 35, and 41

**[FAC 2005-55; FAR Case 2008-032; Item I; Docket 2010-0107,
Sequence 1]**

RIN 9000-AL69

**Federal Acquisition Regulation; Preventing Abuse of
Interagency Contracts**

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: DoD, GSA, and NASA have adopted as final, with changes, an interim rule amending the Federal Acquisition Regulation (FAR) to implement a section of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, to prevent abuse of interagency contracts.

DATES: Effective Date: [INSERT DATE 30 DAYS AFTER

PUBLICATION IN THE FEDERAL REGISTER.]

FOR FURTHER INFORMATION CONTACT: Ms. Lori Sakalos, Procurement Analyst, at (202) 208-0498 for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at (202) 501-4755. Please cite FAC 2005-55, FAR Case 2008-032.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA published an interim rule in the Federal Register at 75 FR 77733 on December 13, 2010, to implement paragraphs (b) and (d) of section 865 of the Duncan Hunter National Defense Authorization Act (NDAA). The rule is designed to ensure that the benefits of interagency acquisitions are consistently achieved.

The FAR changes are applicable to all interagency acquisitions issued under the Economy Act (31 U.S.C. 1535) as well as other authorities, in recognition that an increasing number of interagency acquisitions are conducted using authorities other than the Economy Act. This rule strengthens FAR subpart 17.5, Interagency Acquisitions by—

- Broadening the scope of coverage to address all interagency acquisitions that result in a contract action, but does not apply to Federal Supply Schedule (FSS) orders under \$500,000;
- Requiring agencies to support the decision to use an interagency acquisition with a determination that such action is the “best procurement approach;” and
- Directing that assisted acquisitions be accompanied by written agreements between the requesting agency and the servicing agency documenting the roles and responsibilities of the respective parties.

Five respondents submitted comments on the interim rule. Two of the respondents from the same organization provided duplicate comments.

II. Discussion and Analysis

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) reviewed the public comments in the development of the final rule. A discussion of the comments and the changes made to the rule as a result of those comments are provided as follows:

A. Summary of significant changes

As a result of public comments, changes were made to the interim rule to—

1. Make it clear that FAR subpart 17.5 applies to interagency acquisitions when an agency needing supplies or services obtains them using another agency's contract; or when an agency uses another agency to provide acquisition assistance, such as awarding and administering a contract, a task order, or delivery order. The subpart does not apply to interagency reimbursable work performed by Federal employees (other than acquisition assistance), or interagency activities where contracting is incidental to the purpose of the transaction;

2. Revise FAR 35.017 to permit that when a nonsponsoring agency requests, under the authority of the Economy Act, the use of a Federally Funded Research and

Development Center (FFRDC), the nonsponsoring agency may incorporate the determination required by FAR 17.502-1(a) into the determination and finding justification required by FAR 17.502-2(c);

3. Expand the requirement for business-case analysis when creating multi-agency contracts (MACs) to include governmentwide acquisition contracts (GWACs). Therefore, the procedures for establishing MACs and GWACs have been relocated from FAR 17.502-2(d) to 17.502-1(c) and hyperlinked to the Office of Federal Procurement Policy (OFPP) Business Case guidance.

B. Analysis of public comments

Respondents submitted comments covering the following seven categories:

- Best procurement approach determination.
- "Direct acquisition" definition.
- Written agreement for direct acquisition.
- Citing correct statutory authority for an interagency agreement.
- Content of determination and findings.
- Federal Supply Schedule orders and open market procurements.
- Business-case analysis.

1. Best procurement approach determination

Comment: One respondent asked if a class/commodity determination could be used for those products/services that might be ordered repeatedly from the FSS. Otherwise, according to the respondent, a determination for each procurement will be necessary.

Response: The best procurement approach determination, as described at FAR 17.502-1(a), is required by section 865 of the NDAA for Fiscal Year 2009 for any FSS order exceeding \$500,000. The law does not provide for class or commodity determinations.

Comment: Some respondents expressed concern that an additional determination is required when agencies are using Schedules. The amended FAR 8.404(2) has added a requirement for FSS orders over \$500,000 to make a determination that use of FSS is the best procurement approach. However, FAR 8.002 establishes use of FSS as part of the "Priorities for Use of Government Supply Sources." It is not clear why an additional determination is required when agencies are using the Schedules as intended and as established by the FAR.

Response: The determination is required because it is mandated by section 865 of the NDAA for Fiscal Year 2009 and applies to FSS orders over \$500,000. Federal Supply Schedules are already priority sources, although not mandatory.

Comment: One respondent asked for additional guidance for lower prices when determining the best procurement approach at FAR 17.502-1(a)(2)(ii)(B). The reference to lower prices does not provide adequate guidance to contracting officers. Also, according to the respondent, an additional factor that should be listed under FAR 17.502-1(a)(2) is the cycle time to award.

Response: Lower price is one of the factors to be considered in determining the appropriate contract vehicle. Once this analysis is performed, other factors should be considered while following the ordering procedures as prescribed in FAR subparts 8.4 and 16.5. The determination criteria outlined at FAR 17.502-1(a)(2) is not an all inclusive list and does not preclude the use of other factors.

2. "Direct acquisition" definition

Comment: One respondent suggested adding to the current definition of "direct acquisition" the following sentence: "A direct acquisition is also a type of interagency agreement where the servicing agency performs work using their own resources."

One respondent suggested adding the phrase "or through performance that uses the servicing agency's resources" in the text of FAR 17.501(a), after the phrase, "such as task and delivery-order contracts." Further, the respondent

recommended, at FAR 17.502-1, adding a subsection (a)(3) to require that, prior to placing an order with another agency, the requesting agency shall make a determination that the servicing agency is able to provide the required supplies or services.

Response: A "direct acquisition," as defined in FAR 2.101(b)(2), is a type of interagency acquisition, not a type of interagency agreement. An interagency agreement establishes general terms and conditions governing the relationship between servicing agencies and requesting agencies as set forth in FAR 17.502-1(b)(1)(i). Interagency acquisitions may be a product of interagency agreements; the two are not the same. An interagency agreement whereby a servicing agency performs work using its own resources is not considered an interagency acquisition under the FAR.

The second respondent's comment relies on the addition of interagency agreements in the definition of direct acquisition, which the Councils did not adopt.

To provide additional clarity that the FAR only covers interagency transactions that result in a contract action, the rule was revised at FAR 17.500 and 17.502-2.

3. Written agreement for direct acquisition

Comment: One respondent stated that the current text at FAR 17.502-1(b)(2) should be deleted and replaced with the requirement for a written agreement because section 865

of the NDAA for Fiscal Year 2009 applies to all interagency agreements.

Response: The written agreement assigns responsibility for contract administration and management between the requesting agency and the servicing agency. The FAR does not require an additional written agreement for a direct acquisition because the basic contract outlines administration and management responsibilities; therefore, the requesting agency should follow ordering procedures/instructions per the contract vehicle.

4. Citing correct statutory authority for an interagency agreement

Comment: One respondent recommended that FAR 17.502-2(b) be revised by dividing into two parts and adding new text as follows: "(2) Agencies are responsible for determining whether statutory authority other than Economy Act applies to a particular interagency agreement." The respondent believed that because interagency agreements result in the transfer of funds from one agency to another, agencies must choose the correct authorizing statute for a particular interagency transaction.

Response: The statutory authority should be cited in the interagency agreement. Additional guidelines for preparing interagency agreements, including statutory authorities, are available at FAR 17.502-1(b).

5. Content of determination and findings for Economy Act acquisitions

Comment: One respondent suggested adding a new subsection at FAR 17.502-2(c), to read as follows: "(3) The D&F should provide factual information to support the determinations of (c)(2)." According to the respondent, without a requirement for factual information, the requesting agency's determination can be added as a mere unsupported statement.

Response: Findings are statements of fact or rationale essential to support the determination and are already required in any determination and findings (D&F), as defined at FAR 1.701.

Note that the FAR does not require a formal D&F for determinations of best procurement approach. They are prepared in accordance with FAR 17.501-1(a).

6. Federal Supply Schedule orders and open market procurements

Comment: One respondent expressed concern that the new rule requiring a best procurement approach determination for FSS orders exceeding \$500,000, combined with the lack of corresponding determination for open market commercial item procurements, creates a presumption of favoring duplicative, open market procurements. According to the respondent, the

rule also creates an incentive to split FSS orders to avoid exceeding the \$500,000 threshold for a determination.

One respondent suggested that to provide clarity and ensure a level playing field in the acquisition planning process, the FAR should be amended to require a best procurement approach determination for open market procurements as well as FSS orders and other interagency transactions. Further, according to the respondent, FAR 7.105(b), Contents of written acquisition plans, should be amended to include the requirement for a best procurement approach determination for all transactions requiring an acquisition plan, including open market procurements.

Response: The best procurement approach determination is required for FSS orders greater than \$500,000 by section 865 of the NDAA for Fiscal Year 2009. This statute does not encourage the splitting of orders exceeding the \$500,000 threshold. FSS contracts are already priority sources, although not mandatory. The statute seeks to prevent abuse and implement controls for the interagency acquisitions process and is not intended to create barriers to the use of the FSS.

Per FAR 7.102, agencies are required to perform acquisition planning and conduct market research for all acquisitions to ensure that the acquisition represents the best interests of the Government. If the result of

acquisition planning is to use either a direct acquisition or an assisted acquisition, then the contracting officer is required to prepare a best procurement approach determination.

As for the comment of creating a presumption of favoring duplicative, open market procurements, FAR case 2009-024, Prioritizing Sources of Supplies and Services for Use by the Government, which was published as a proposed rule on June 14, 2011 (76 FR 34634), will address the priority and consideration of open market sources as part of acquisition planning. The recommendation for developing a best procurement approach determination for open market procurements is outside the scope of this case.

7. Business-case analysis

Comment: One respondent suggested that FAR 17.502-2(d) should require that the business-case analysis address whether any other interagency contract vehicles, like the Multiple-Award Schedule program, meet the servicing agency's needs.

Response: Business-case analysis is required by this statute for multi-agency contracts under the Economy Act. The requirement for the servicing agency to consider other existing contract vehicles is already covered under business-case analysis requirements for MACs and GWACs, which has been relocated to FAR 17.502-1(c).

C. Other changes

During deliberations, the Councils determined that revisions to FAR 35.017-3 were necessary to clarify and streamline instructions for the placement of orders with FFRDCs. The FAR text at 35.017-3 has been revised to permit nonsponsoring agencies desiring to place orders against an FFRDC contract the option of incorporating the best procurement approach determination required by FAR 17.502-1(a) into the D&F required by FAR 17.502-2(c), subject to approval by the sponsoring agency.

III. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is a significant regulatory action and, therefore, was subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

IV. Regulatory Flexibility Act

The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration certify that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, et seq., because the rule does not impose any requirements on small entities.

V. Paperwork Reduction Act

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Parts 2, 4, 7, 8, 9, 17, 18, 35, and 41

Government procurement.

Dated: December 21, 2011.

/s/

Laura Auletta,
Director, Office of Governmentwide
Acquisition Policy,
Office of Acquisition Policy,
Office of Governmentwide Policy.

INTERIM RULE ADOPTED AS FINAL WITH CHANGES

Accordingly, the interim rule amending 48 CFR parts 2, 4, 7, 8, 9, 17, 18, 35, and 41, which was published in the Federal Register at 75 FR 77733, December 13, 2010, is adopted as final with the following changes:

1. The authority citation for 48 CFR parts 17 and 35 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 17—SPECIAL CONTRACTING METHODS

2. Amend section 17.500 by removing from paragraph (a) "paragraph (b)" and adding "paragraph (c)" in its place; revising paragraph (b); and adding paragraph (c) to read as follows:

17.500 Scope of subpart.

* * * * *

(b) This subpart applies to interagency acquisitions, see 2.101 for definition, when—

(1) An agency needing supplies or services obtains them using another agency's contract; or

(2) An agency uses another agency to provide acquisition assistance, such as awarding and administering a contract, a task order, or delivery order.

(c) This subpart does not apply to—

(1) Interagency reimbursable work performed by Federal employees (other than acquisition assistance), or interagency activities where contracting is incidental to the purpose of the transaction; or

(2) Orders of \$500,000 or less issued against Federal Supply Schedules.

3. Amend section 17.502-1 by revising the introductory text of paragraph (a)(2); removing from paragraph (a)(2)(ii)(A) "already"; and adding paragraph (c) to read as follows:

17.502-1 General.

(a) * * *

(2) Direct acquisitions. Prior to placing an order against another agency's indefinite-delivery vehicle, the requesting agency shall make a determination that use of another agency's contract vehicle is the best procurement approach and shall obtain the concurrence of the requesting agency's responsible contracting office. At a minimum, the determination shall include an analysis, including factors such as:

* * * * *

(c) Business-case analysis requirements for multi-agency contracts and governmentwide acquisition contracts.

In order to establish a multi-agency or governmentwide acquisition contract, a business-case analysis must be

prepared by the servicing agency and approved in accordance with the Office of Federal Procurement Policy (OFPP)

business case guidance, available at

<http://www.whitehouse.gov/sites/default/files/omb/procurement/memo/development-review-and-approval-of-business-cases-for-certain-interagency-and-agency-specific-acquisitions-memo.pdf>. The business-case analysis shall—

(1) Consider strategies for the effective participation of small businesses during acquisition planning (see 7.103(u));

(2) Detail the administration of such contract, including an analysis of all direct and indirect costs to the Government of awarding and administering such contract;

(3) Describe the impact such contract will have on the ability of the Government to leverage its purchasing power, e.g., will it have a negative effect because it dilutes other existing contracts;

(4) Include an analysis concluding that there is a need for establishing the multi-agency contract; and

(5) Document roles and responsibilities in the administration of the contract.

4. Amend section 17.502-2 by—

- a. Revising paragraphs (a) and (c);
- b. Removing paragraph (d);

c. Redesignating paragraph (e) as paragraph (d);
and

d. Revising the newly redesignated paragraph
(d)(4) to read as follows:

17.502-2 The Economy Act.

(a) The Economy Act (31 U.S.C. 1535) authorizes agencies to enter into agreements to obtain supplies or services from another agency. The FAR applies when one agency uses another agency's contract to obtain supplies or services. If the interagency business transaction does not result in a contract or an order, then the FAR does not apply. The Economy Act also provides authority for placement of orders between major organizational units within an agency; procedures for such intra-agency transactions are addressed in agency regulations.

* * * * *

(c) Requirements for determinations and findings. (1)
Each Economy Act order to obtain supplies or services by interagency acquisition shall be supported by a determination and findings (D&F). The D&F shall—

(i) State that use of an interagency acquisition is in the best interest of the Government;

(ii) State that the supplies or services cannot be obtained as conveniently or economically by contracting directly with a private source; and

(iii) Include a statement that at least one of the following circumstances applies:

(A) The acquisition will appropriately be made under an existing contract of the servicing agency, entered into before placement of the order, to meet the requirements of the servicing agency for the same or similar supplies or services.

(B) The servicing agency has the capability or expertise to enter into a contract for such supplies or services that is not available within the requesting agency.

(C) The servicing agency is specifically authorized by law or regulation to purchase such supplies or services on behalf of other agencies.

(2) The D&F shall be approved by a contracting officer of the requesting agency with authority to contract for the supplies or services to be ordered, or by another official designated by the agency head, except that, if the servicing agency is not covered by the FAR, approval of the D&F may not be delegated below the senior procurement executive of the requesting agency.

(3) The requesting agency shall furnish a copy of the D&F to the servicing agency with the request for order.

(d) * * *

(4) In no event shall the servicing agency require, or the requesting agency pay, any fee or charge in excess of

the actual cost (or estimated cost if the actual cost is not known) of entering into and administering the contract or other agreement under which the order is filled.

17.503 [Amended]

5. Amend section 17.503 by removing from paragraph (b)(4) "(see 17.502-2(e))" and adding "(see 17.502-2(d))" in its place.

PART 35—RESEARCH AND DEVELOPMENT CONTRACTING

6. Amend section 35.017-3 by revising paragraph (b) to read as follows:

35.017-3 Using an FFRDC.

* * * * *

(b) Where the use of the FFRDC by a nonsponsor is permitted by the sponsor, the sponsor shall be responsible for compliance with paragraph (a) of this subsection.

(1) The nonsponsoring agency shall prepare a determination in accordance with 17.502-1(a) and provide the documentation required by 17.503(e) to the sponsoring agency.

(2) When a D&F is required pursuant to 17.502-2(c), the nonsponsoring agency may incorporate the determination required by 17.502-1(a) into the D&F and provide the documentation required by 17.503(e) to the sponsoring agency.

(3) When permitted by the sponsor, a Federal agency may contract directly with the FFRDC, in which case that Federal agency is responsible for compliance with part 6.

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